Filed 10/4/10 P. v. Hunter CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DERRICK HUNTER, Defendant and Appellant.	C063435 (Super. Ct. No. 07F08778)

Defendant Derrick Hunter was charged with unlawful possession of ammunition, evading a peace officer, and participating in a criminal street gang. (Pen. Code, § 12316, subd. (b)(1);[1] Veh. Code, § 2800.2, subd. (a); § 186.22, subd. (a).) The charges arose out of a nighttime traffic stop, after which defendant attempted to evade officers who stopped him for speeding. Following unsuccessful pretrial motions, defendant pleaded no contest to the charges, admitted allegations of a

---

[1] Undesignated statutory references are to the Penal Code.

prior conviction and prison term, and was sentenced to six years in prison.

Defendant challenges his plea to the charge he participated in a criminal street gang, contending that it was based upon an illusory promise that he could appeal the court's denial of his motion to dismiss the charge under section 995. Because no appeal lies from the denial of such a motion, defendant argues he must be given the option of withdrawing his plea. The People concede the error, and we agree. We shall remand the case to the trial court to permit defendant the opportunity, if he wishes, to withdraw his no contest plea and to allow the court, if he does so, to select one of the two remaining counts as the principal count for sentencing purposes.

FACTS

Because this appeal concerns only the legal question of whether defendant has the right to withdraw his no contest plea, we present a short summary of the facts derived chiefly from the probation report and plea proceedings.

Sheriffs stopped a car driven by defendant after they saw him speeding through a residential neighborhood after dark. His passenger was James Brewer. Defendant told officers he was on parole. But when they asked him to step out of the car, defendant sped away and led officers on a high-speed pursuit for about two miles, stopping only when the car went through a fence and came to rest in some shrubbery. Brewer jumped out of the car and fled; a loaded handgun was found on the ground in the area of the passenger door where Brewer sat.

In a search of defendant's house, officers found ammunition in his closet.

As relevant to this appeal, defendant was ultimately charged with unlawful possession of ammunition by a felon (count three), evading a police officer (count four), and participating in a criminal street gang (count five).

Defendant moved (among other things) to dismiss or sever trial of the gang participation count. The court granted his motion to sever. Defendant then filed a section 995[2] motion to dismiss it. That motion was denied.

After defendant's section 995 motion to dismiss the gang participation charge was denied, defendant entered a "straight up" plea of no contest to the other two charges, possessing ammunition and evading an officer, and admitted a prior strike conviction.

A few days later, defendant entered a plea of no contest to the gang participation charge. Before he did so, defense counsel stated on the record that he had "grudgingly" recommended defendant change his plea, and had done so only because defendant could preserve for review by the Court of Appeal the trial court's denial of his section 995 motion.

At sentencing, the court selected the gang participation count as the principal count; it sentenced defendant to state

---

[2] Section 995 provides in pertinent part that an information shall be set aside by the court if the court finds "[t]hat the defendant had been committed without reasonable or probable cause." (§ 995, subd. (a)(2)(B).)

prison for the upper term of three years, doubled by virtue of his prior strike conviction to six years. On each of the remaining counts, the court also imposed a prison term of three years, doubled to six years by virtue of defendant's prior strike conviction, but stayed their imposition under section 654.

DISCUSSION

I. Defendant May Withdraw His Plea to the Gang Participation Count

Defendant contends on appeal his no contest plea to count five (participation in a criminal street gang) is invalid because it was based upon the representation of counsel in open court that he could appeal from the court's denial of his section 995 motion. Because denial of a section 995 motion is not appealable following a guilty plea (*People v. Truman* (1992) 6 Cal.App.4th 1816, 1820-1821), defendant argues that his no contest plea to that charge was founded upon an illusory promise, and he may be permitted to withdraw his plea if he so chooses.

The People concede the argument and we agree. It is settled that the denial of a section 995 motion is not appealable following the entry of a no contest or guilty plea. (*People v. Truman*, *supra*, 6 Cal.App.4th at pp. 1820-1821; *People v. Hollins* (1993) 15 Cal.App.4th 567, 574-575; *People v. Padfield* (1982) 136 Cal.App.3d 218, 227 [defendant cannot admit the sufficiency of the evidence by pleading no contest and then question the evidence on appeal].) The sole exception to this

principle is that an appeal following a plea of guilty or no contest is not precluded where the section 995 motion is founded on a challenge to a search or seizure. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896-897; *People v. Schoennauer* (1980) 103 Cal.App.3d 398, 404-406.) That exception does not apply here.

The fact that a defendant has obtained a certificate of probable cause does not make cognizable on appeal an issue that has been waived by entry of a guilty or no contest plea. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9.) This is founded upon the principle that "the trial court's acquiescence in a defendant's expressed intention to appeal is wholly ineffective to confer jurisdiction on the appellate court if the issue proposed to be raised is in fact not cognizable on appeal." (*People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1361.)

The parties concur, and we agree, that defendant premised his no contest plea to the gang participation charge in significant part on the preservation of his purported right to appeal the denial of his section 995 motion. The implicit promise that he could appeal from the denial of that motion was an illusory one. Accordingly, we conclude that he should be permitted an opportunity to withdraw his plea to count five and, if he so desires, proceed to trial.

If defendant elects to do so, the trial court shall on remand exercise its discretion to determine which of the two remaining sentences -- stayed in their entirety under section 654 while defendant's conviction on the gang participation

charge stood -- shall be designated the primary sentence and reinstated.[3]

II. The Abstract of Judgment Correctly Reflects the Fees Imposed at Sentencing

Defendant contends on appeal the abstract of judgment reflects four fees *not* imposed by the trial court at sentencing: a court security fee (§ 1465.8, subd. (a)(1)); a criminal conviction assessment fee (also referred to as a mandatory court facility fee, Gov. Code, § 70373); a main jail booking fee (Gov. Code, § 29550.2); and a jail classification fee (Gov. Code, § 29550.2). He argues these four fees must be stricken from the abstract of judgment because the trial court did not orally impose them at sentencing. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471 [when discrepancies between the oral pronouncement rendering judgment and the abstract of judgment exist, the oral pronouncement controls]; see also *People v. Zackery* (2007) 147 Cal.App.4th 380, 386-388.)

As the People correctly point out, defendant is mistaken. At sentencing, the trial judge announced she was referring to the probation report as she imposed sentence. In the course of imposing the various fines and fees as part of the sentence, the court stated, "[t]he court will also impose items 4, 5, 6 and 7 on page 9." "[I]tems 4, 5, 6 and 7 on page 9" of the probation

---

[3] The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he had a prior conviction(s) for a serious or violent felony. (§ 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

report are the court security fee (item 4), a criminal conviction assessment fee (item 7), main jail booking fee (item 5), and jail classification fee (item 6).

There was no error.[4]

DISPOSITION

The matter is remanded to the trial court to allow defendant the opportunity to withdraw his plea to count five. Should he fail to do so within 60 days of the filing of the remittitur, the judgment is affirmed.

SIMS, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.

[4] However, to eliminate such claims of error, we urge the trial court in the future to articulate all fees and fines imposed in accordance with our opinion in *People v. High* (2004) 119 Cal.App.4th 1192, 1200.